(?) 94-186

No.

Supreme Court, U.S.
FILED
JUL 22 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

TOM L. RAGLAND,

Petitioner,

against

ALAN MINTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS

BRIEF IN OPPOSITION FOR RESPONDENT ALAN MINTER

WILLIAM R. ALLENSWORTH, ESQ.
MATTHEW J. SULLIVAN, ESQ.
HAYNES AND BOONE, L.L.P.
Attorneys for Respondent
1600 One American Center
600 Congress Avenue, Suite 1600
Austin, Texas 78701
(512) 867-8400

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(4208—1994)
Printed on Recycled Paper

18 pp

Question Presented

Whether, in Texas, where a finding that a suit is filed in bad faith is requisite to the taking of an attorney's property through a monetary sanction, and an evidentiary hearing is actually held on such issue, wherein the undisputed evidence shows a good faith filing, is the action of an Appellate Court in upholding such a taking solely on the basis that affidavits bearing on an entirely different issue were merely on file in the clerk's office, a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, if said attorney had no notice prior to nor even during said actual evidentiary hearing that such affidavits were to be considered on said issue of sanctions?

Table of Contents

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Petition for Writ of Certiorari to the Court of Appeals Third District of Texas 1

Statement of the Case 2

Summary of the Argument 4

Argument 5

Conclusion 7

Certificate of Service 8

Appendix A 9

Table of Authorities

Abcon Paving, Inc. v. Crissup, 820 S.W.2d 951 (Tex. App.—Fort Worth 1991, no writ) 6

Bodnow Corp. v. City of Hondo, 721 S.W.2d 839 (Tex. 1986) 6

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987).. 6

Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986) 6

Eguia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985).... 5

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916 (Tex. 1985) 5

Koslow's v. Mackie, 796 S.W.2d 700 (Tex. 1990) 6

Lassiter v. Shavor, 824 S.W.2d 667 (Tex. App.—Dallas 1992, no writ)..... 6

U.S. Fidelity & Guar. Co. v. Rossa, 830 S.W.2d 668 (Tex. App.—Waco, 1992, writ denied) 5

Page

CONSTITUTION, STATUTES AND RULES:

W. Hall, Standards of Appellate Review in Civil Cases, 21 ST. MARY'S L.J. 865, 879 (1990) 6

MISCELLANEOUS:

U.S. CONST., amend. XIV 5

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOM L. RAGLAND,

Petitioner,

versus

ALAN MINTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
THIRD DISTRICT OF TEXAS

Brief in Opposition for Respondent Alan Minter

The Respondent, Alan Minter, respectfully asks that the Court deny Petitioner's request that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals, Third District of Texas, rendered in these proceedings on August 25, 1993, because there is no conflict with any

decision of this Court or with any decision of any other circuit and there is no issue of national importance involved in this matter.

Statement of the Case

Petitioner Ragland's statement of the case is misleading. For this reason, Alan Minter submits the following:

The lawsuit underlying the trial court's award of sanctions originated when Ragland's client, Margie Morris, brought suit against the owners and several employees of a self-service storage facility, alleging that they had wrongfully sold Morris' stored property in satisfaction of unpaid rent charges. Eighteen months after the commencement of this lawsuit, Ragland filed a Third Amended Original Petition adding Minter and others as defendants.

In the years since 1984, Minter had occasionally served as the attorney for the defendant mini-storage company. The substance of Morris' allegations was that Minter, as attorney for the defendant company, conspired with the defendants to convert Morris' property, wrongfully assisted in the preparation of policies and procedures that subsequently harmed Morris, and allegedly gave legal advice to the warehouse owner that was negligent and which harmed Morris. On October 29, 1991, the trial court granted summary judgment in favor of Minter and dismissed with prejudice all of the causes of action asserted against Minter.

On December 26, 1991, Minter filed in the trial court a Motion for Sanctions for Violation of Rule 13 on the grounds that Morris' suit against Minter was groundless and

brought in bad faith or for the purpose of harassment. Minter's motion sought sanctions against Morris and her attorney, Ragland, pursuant to Rule 13 of the Texas Rules of Civil Procedure, because (i) Morris and Ragland knew or should have known that, absent privity, an attorney is not liable to third parties for professional negligence, (ii) Ragland failed to make a reasonable inquiry into the legal or factual basis for the claims against Minter despite previous depositions that established that Minter was not involved in the sale of Morris' property, and (iii) Morris' claims against Minter were asserted for the improper purpose of obtaining a continuance and discrediting Minter's testimony as an expert witness for the original defendants. In support of the motion, Minter referred to the Petition, his Motion for Summary Judgment, and Ragland's response to the Motion for Summary Judgment.

After an evidentiary hearing on the motion for sanctions—at which Ragland candidly testified that he was unaware of any cases establishing a cause of action against an attorney under the circumstances presented in Morris' lawsuit, and that he was not seeking to expand the law in this area—the trial court concluded that there was no basis in law or fact for Morris' allegations against Minter, that the claims against Minter were baseless and without reasonable and competent inquiry into the facts and law, and that the claims against Minter were groundless, in bad faith and brought for the purpose of harassment.

The court also found that Minter was included as a defendant because he sought to taint any testimony of Minter as an expert witness, and, in light of these conclusions, ruled that good cause existed for the imposition of $13,200 in sanctions against Morris and Ragland, and conditional

awards of $5,000 and $4,000, respectively, if appeals were taken before the Court of Appeals and the Texas Supreme Court.

Prior to its affirmance of the sanctions award, the Third Court of Appeals mistakenly struck[1] the copies of the deposition excerpts used at the sanctions hearing. The majority of those excerpts, however, were still before the trial and appellate courts because they were also attached to the motion for summary judgment and motion for sanctions, which were included in the record. After reviewing the record (excluding the stricken evidence) and hearing the arguments of counsel, the Third Court of Appeals affirmed the sanctions award against Ragland. The Texas Supreme Court correctly denied Ragland's Application for Writ of Error.

Summary of Argument

Although the manner in which Ragland has framed his question to the Court misstates the facts and the appellate Court's reasoning in its affirmance of the sanctions award, the essence of his complaint involves the scope of appellate review. The Third Court of Appeals correctly applied an abuse of discretion standard which obligated the Court to review the entire record, which did not violate Ragland's due process rights.

---

[1]Respondent has not appealed this action.

Argument

A. Due Process Rights Under 14th Amendment Satisfied at Trial Court

Contrary to Ragland's framing of his question which is presented to the Court, a cursory review of the Findings of Fact and Conclusions of Law (App.) and the Appellate Court's opinion reflect that his right of due process under the Fourteenth Amendment of the United States Constitution was satisfied in connection with the sanctions proceeding. Specifically, he was provided notice of the reasons for the imposition of sanctions and had an opportunity to respond to the allegations. *See Eguia v. Tompkins,* 756 F.2d 1130, 1139 (5th Cir. 1985). Indeed, he appeared in Court and was provided an opportunity to object to the allegations and he also testified during the hearing. As a result, his due process rights were satisfied in this matter at the trial level.

B. Court of Appeals Applied Proper Scope of Appellate Review

Ragland's due process argument must fail because it ignores the underlying issue—the scope of appellate review in Texas. The Third Court of Appeals properly acknowledged that it was required to examine the entire record, which in this case included the summary judgment evidence and a statement of facts from the evidentiary hearing which support the trial court's affirmance of the sanction award. *See U.S. Fidelity & Guar. Co. v. Rossa,* 830 S.W.2d 668, 672 (Tex. App.—Waco, 1992, writ denied) (Court of Appeals makes an independent inquiry of **entire** record to determine if trial court abused its discretion in imposing sanction); *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 918

(Tex. 1985); *Lassiter v. Shavor,* 824 S.W.2d 667, 669 (Tex. App.—Dallas 1992, no writ); *Abcon Paving, Inc. v. Crissup,* 820 S.W.2d 951, 954 (Tex. App.—Fort Worth 1991, no writ). All of these cases involved the scope of appellate review in connection with an abuse of discretion standard. Indeed, the Court of Appeals was required to—and did—review the summary judgment evidence contained in the record in connection with its affirmance of the trial court's award of sanctions.

The crux of Petitioner's argument is that the trial and appellate courts were not entitled to rely on a particular portion of the record—the summary judgment evidence. This argument must fail because the Court of Appeals was required to apply an abuse of discretion standard in connection with the appeal, which obligated the court to review the entire record of the case. *See Koslow's v. Mackie,* 796 S.W.2d 700, 704 (Tex. 1990); *Bodnow Corp. v. City of Hondo,* 721 S.W.2d 839, 840 (Tex. 1986); W. Hall, *Standards of Appellate Review in Civil Cases,* 21 ST. MARY'S L. J. 865, 879 (1990). Moreover, there is a presumption that the trial court was familiar with the entire record of the case. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied,* 476 U.S. 1159 (1986). As a result, both the trial and appellate courts were entitled to rely on the summary judgment evidence which was included in the record, which did not violate Ragland's right to due process.

C. Authority Inapposite to Present Case

The case which Petitioner claims to be "precisely in point," *Donaldson v. Clark,* 819 F.2d 1551 (11th Cir. 1987), is, in fact, factually different from the present case. In *Donaldson,* a Federal District Court imposed sanctions without providing the sanctioned party with a hearing,

which the appellate court determined to be error. *Id.* at 1554. In the present case, there was ample notice and a hearing which included testimony from Ragland. Likewise, the other cases relied on by Ragland can be factually distinguished from the present case because they involve cases where the sanctioned party was not provided a hearing or opportunity to respond or was not informed about the grounds on which sanctions were imposed.

Conclusion

Based on the above, there is no conflict with any decision of this Court or with any decision of any other circuit and there is no issue of national importance involved in this matter. As a result, Ragland presents no question that merits this Court's review and the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

HAYNES AND BOONE, L.L.P.
1600 One American Center
600 Congress Avenue
Austin, Texas 78701
Telephone: (512) 867-8400
Telecopier: (512) 867-8470

William R. Allensworth
State Bar No. 01077500
Matthew J. Sullivan
State Bar No. 19488325

ATTORNEYS FOR ALAN H. MINTER,
RESPONDENT

Certificate of Service

This is to certify that a true and correct copy has been mailed to counsel for Petitioner, W. V. Dunnam, Jr., P. O. Box 8418, 4125 West Waco Drive, Waco, Texas 76714-8418.

William R. Allensworth
Matthew J. Sullivan

APPENDIX A—Findings of Fact and Conclusions of Law

CAUSE NO. 475,697-A

MARGIE MORRIS

v.

ALAN H. MINTER and TEXAS MINI STORAGE ASSOCIATION

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
147TH JUDICIAL DISTRICT

CAUSE NO. 475,697-B

MARGIE MORRIS

v.

ALAN H. MINTER

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
147TH JUDICIAL DISTRICT

CAUSE NO. 475,697-D

MARGIE MORRIS

v.

ALAN H. MINTER

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
147TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court makes the following Findings of Fact and Conclusions of Law in connection with the Order dated February 4, 1992 which imposed sanctions against Tom L. Ragland and Plaintiff Margie Morris for violation of Rule 13 of the Texas Rules of Civil Procedure. To the extent a finding of fact is actually a conclusion of law, it should be construed as a conclusion of law. Likewise, if a conclusion of law is actually a finding of fact, it should be construed as a finding of fact.

I.

FINDINGS OF FACT

1. Alan Minter is an attorney licensed to practice law in the State of Texas.

2. Mr. Minter previously served as counsel to one or more of the original defendants.

3. Plaintiff's Original Petition was filed in State District Court in Travis County, Texas on December 8, 1989. Plaintiff's suit arises from the alleged wrongful foreclosure sale of her personal property which was stored in a mini storage facility. Plaintiff brought her suit against the owners of the mini storage facility on the grounds that the owners' actions allegedly violated the Constitution, and they were guilty of conversion, conspiracy, negligence, and the DTPA. During the next year and one-half, Plaintiff engaged in written discovery and took the depositions of a number of defendants and designated witnesses.

4. Plaintiff designated Alan Minter as an expert witness (without his knowledge) and took his deposition on July 3, 1991.

5. On August 6, 1991, Plaintiff filed her Third Amended Original Petition, which added Minter as a party to the lawsuit. The Petition reflects that Minter was sued in his capacity as attorney and counselor, and alleged a number of causes of action against Minter including civil conspiracy, conversion, negligence, and gross negligence.

6. Minter filed a motion to sever the claims against him, which the court granted on September 6, 1991. After the claims against Mr. Minter were severed, Mr. Minter was granted summary judgment on October 24, 1991. On December 26, 1991, Mr. Minter filed a Motion for Sanctions against Plaintiff and her counsel, Tom Ragland, for violation of Rule 13 of the Texas Rules of Civil Procedure.

7. After notice, a hearing was held on February 4, 1992, and both parties appeared and were represented by counsel.

8. Minter has never served as legal counsel to Plaintiff. Moreover, as reflected in the excerpts of the depositions of EdWayne G. Priesmeyer, Janet Mayhew, and Alan Minter, Mr. Minter did not provide any legal advice in connection with the sale of Plaintiff's property.

9. At the sanctions hearing, Mr. Ragland testified that he had no intention to write new law when he included claims against Mr. Minter in Plaintiff's Third Amended Original Petition. Furthermore, Mr. Ragland was not aware of any case, at any appellate level, that has ever attached liability to

an attorney rendering advice to a client under circumstances similar to the present case.

10. Mr. Minter was included as a defendant because Mr. Ragland was not satisfied with his discovery progress with respect to Mr. Minter. Moreover, the only apparent purpose for the inclusion of Minter as a defendant was to taint any expert testimony which Mr. Minter would provide on the mini storage business and the application of pertinent law to the facts of Plaintiff's case.

11. Mr. Minter incurred attorneys' fees of $13,200 in defense of the claims alleged against him in Plaintiff's Third Amended Original Petition. In the event this matter is appealed by Writ of Error or Mandamus to the Court of Appeals, Mr. Minter would incur attorneys' fees of approximately $5,000. In the event an appeal by Writ of Error or Mandamus to the Texas Supreme Court is necessary, Minter would incur approximately $4,000 in attorneys' fees.

II.

CONCLUSIONS OF LAW

12. The Court relies on Texas Rule of Civil Procedure 13, as amended April 24, 1990.

13. The court presumed the Third Amended Original Petition was filed in good faith. I find, however, there was no basis in law or fact for Plaintiff's assertions that Minter conspired to accomplish an unlawful purpose or to accomplish a lawful purpose through an unlawful means, converted Plaintiff's property, was negligent or grossly negli-

gent, or any other claim against Minter contained in Plaintiff's Third Amended Original Petition. As a result, the claims against Minter were groundless as defined by Rule 13.

14. There is no evidence that Mr. Minter provided legal advice to any of the defendants with respect to the foreclosure sale which is the basis of Plaintiff's claims.

15. The claims against Minter were not made as part of an argument for an extension, modification, or reversal of existing law.

16. The filing of Plaintiff's claims against Minter was baseless and made without reasonable and competent inquiry into the facts of law.

17. The Court concludes that at the time of the filing, the assertions contained in the Third Amended Original Petition with respect to the liability of Minter were groundless and in bad faith.

18. The filing of Plaintiff's claims against Minter was groundless and brought for the purpose of harassment.

19. Good cause exists to impose sanctions for the reasons stated in Paragraphs 8-10, and 12-18 of these Findings of Fact and Conclusions of Law.

20. Mr. Ragland's signature on the Third Amended Original Petition violated Texas Rule of Civil Procedure 13. Therefore, in accordance with Texas Rule of Civil Procedure 215, the court imposes sanctions upon Mr. Ragland

and Ms. Morris in the amount of $13,200, which are Mr. Minter's reasonable and necessary attorneys' fees to defend the claims against him. In the event this matter is appealed by Writ of Error or Mandamus, attorneys' fees on behalf of Mr. Minter in the amount of $5,000 would be reasonable and necessary. In the event it is appealed by Writ of Error or Mandamus to the Supreme Court of Texas, attorneys' fees of $4,000 would be reasonable and necessary.

SIGNED this 13 day of May, 1992.

John K. Dietz
JUDGE PRESIDING

Filed
May 14, 2:53 PM '92
Amalia Rodriguez-Mendoza
District Clerk
Travis County, Texas